IN THE

United States Supreme Court

October Term 1977

No. 77-1436

George B. Setchell,

Petitioner,

vs.

Anoka County, Minnesota,
Sheriff's Civil Service
Commission,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court
of the State of Minnesota

JACK S. NORDBY
THOMSON & NORDBY
Suite 1530 - 55 East Fifth Street
Saint Paul, Minnesota 55101
(612) 227-0856
Counsel for Petitioner

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CITATIONS

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The Petitioner, George B. Setchell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in this matter on December 16, 1977, with rehearing being denied on January 10, 1978.

OPINION BELOW

The opinion of the Supreme Court of Minnesota, reported as *In the Matter of the Discipline of George B. Setchell, Deputy Sheriff, Anoka County, Minnesota,* ____ Minn. ____, 261 N.W.2d 354 (1977) is contained in the appendix hereto, together with the order of January 10, 1978, denying rehearing.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on December 16, 1977. A petition for rehearing was denied on January 10, 1978; and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTION PRESENTED

Whether Petitioner was denied due process of law when he was discharged from his position as a deputy sheriff upon evidence showing at worst an inadvertant failure to deliver certain evidence for processing, and no damage, injury or loss resulted from the omission?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV

. . . nor shall any State deprive any person of life, liberty or property, without due process of law. . .

STATUTE INVOLVED

Minn. Stat. §387.37:
Removal only upon charges

No deputy sheriff or employee after continuous employment of one year shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense as in sections 387.31 to 387.45 hereinafter provided. Such charges shall be investigated by or before such civil service commission. The finding and decision of such commission shall be forthwith certified to the sheriff, to be forthwith enforced by him.

Nothing in sections 387.31 to 387.45 shall limit the power of the sheriff, or the superior officer in the sheriff's absence,

to suspend a subordinate for a reasonable period not exceeding 30 days for the purpose of discipline, or pending investigation of charges when it appears such suspension is advisable.

STATEMENT OF THE CASE

George Setchell had been an Anoka County Deputy Sheriff since 1967 when, in June of 1974, he received notice from the Sheriff of certain "charges" against him, and was notified that the Sheriff would seek his termination without severance pay if the charges should be sustained. A hearing was held before the Anoka County Sheriff's Civil Service Commission, which made findings of fact and conclusions of law (Appendix) and ordered Mr. Setchell discharged. The conclusions of law based the discharge on only one charge, failure to obey an order.

On May 23, 1974, a search warrant was executed against one Jon Rector by Deputy Setchell and others; some suspected drugs (apparently in a salt and/or pepper shaker) were seized and taken to the property room; a preliminary test yielded negative results; some days later Deputy Setchell's supervisor, Office Hoogestraat, asked him to take the evidence to the Bureau of Criminal Apprehension (BCA) lab, a routine task for Deputy Setchell, who said he would; still later Hoogestraat checked with the BCA and learned they had not received the Rector evidence; Hoogestraat asked Deputy Setchell (who was suspended at the time) who said that he had taken the evidence to BCA, but could not provide the receipt because his lab and desk keys had been confiscated; the drugs were then found in the Sheriff's property room, intact, apparently never having gone to the BCA. (T. 54-58, 66-71, 75-84)

Deputy Setchell did not dispute any of the foregoing, but pointed out that as a lab officer he very frequently took evidence to the BCA, several times a week at that period, and that when

asked if he had delivered the Rector evidence he replied affirmatively in good faith, believing that he had, and being unable to review his unavailable records to confirm it. (T. 108-112) Rector had been charged with another offense; the evidence remained intact and could have still resulted in a charge (since the statute of limitations would not run out for three years), but neither Hoogestraat nor Undersherriff Dwyer had yet sent them to BCA for analysis after finding them. (T. 82-86) It was not suggested that Deputy Setchell had any motive for not taking the evidence to BCA, or for misrepresenting that he had done so, since that was easily ascertained by contacting BCA. Nevertheless the Commission found that Deputy Setchell "disobeyed a direct order" in failing to take the evidence and "lied" when he stated he had done so, (Findings Nos. 11-20), and concluded that he "willfully disobeyed" a direct order, failed to perform a "critical part" of his assignment, that he was therefore guilty of misconduct under Minn. Stat. §387.41, and should be discharged.

District Judge Robert Gillespie, on appeal, reviewed the transcript of the hearing and found it to substantiate the charges made, and that the action of the Sheriff's Civil Service Commission was reasonable. He therefore affirmed the dismissal. The Minnesota Supreme Court affirmed. (Appendix)

The specific constitutional issue was not raised in the proceedings below because the approach there was that there was no evidence to support or justify Petitioner Setchell's removal from his position as a deputy sheriff, it being implicit that an arbitrary removal without evidentiary support would deprive him of property without due process of law. Since the Commission, the district court judge, and the Minnesota Supreme Court purported to find sufficient evidence to support the dismissal, the due process question was not reached; in view of that disposition it would be futile to pursue that issue in the Minnesota courts, since the opinion below forecloses the issue to Petitioner.

REASONS FOR GRANTING THE WRIT

DUE PROCESS OF LAW IS DENIED WHERE UNDER A STATE STATUTE A DEPUTY SHERIFF IS REMOVED FROM HIS EMPLOYMENT UPON EVIDENCE WHICH SHOWS NO WILLFUL OR CONSCIOUS MISCONDUCT, BUT AT MOST AN INADVERTANT FAILURE TO TRANSPORT AN ITEM OF EVIDENCE FROM ONE POINT TO ANOTHER, WHICH RESULTED IN NO DAMAGE, INJURY OR LOSS.

The Fourteenth Amendment proscribes the deprivation by the states of property without due process of law, and the right to labor — that is, the right to earn wages and acquire property — has long since been held to be within the Amendment's protection. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873); *Smith v. Texas*, 233 U.S. 630 (1918).

The present case presents a situation in which the constitutional protection is particularly important, for it is not a case of such obvious deprivation as refusal or termination of employment on the basis of race or sex; rather it is the more subtle and insidious situation where an agency and the courts *appear* to be acting under a statute designed to accord due process, while in fact only lip service is paid to that statute and employment is terminated on altogether insufficient, merely pretextual evidence.

The Minnesota Supreme Court purported to examine the record for "substantial" evidence supporting termination of Deputy Setchell's employment, and purported to find it; but there is in fact no support for this conclusion in the record. Although it is undisputed that the evidence in question was not delivered as directed, there is no evidence to support the crucial finding and conclusion that this omission was in willful violation of a direct order, as opposed to merely inadvertant.

Indeed the Minnesota court noted that the lower court judge based his affirmance of the discharge in part on "the repetitive nature of the conduct," 261 N.W.2d at 355. In fact the Commission made only *one* conclusion of law in support of the discharge:

that Petitioner failed to obey an order. By the same token, and contrary to the implication of the opinion, the Commission made no conclusion of law that the processing of film for non-police purposes was a reason for the discharge. Though the findings of fact (Appendix) allege that Petitioner had had other difficulties with his superiors, that (even if true) cannot be a substitute for evidence to support discharge on this occasion.

If this decision is permitted to stand, then in Minnesota any agency or commission acting under color of state law, may discharge its employees for the slightest non-compliance with an "order," even in the absence of any injury, damage or loss. The Minnesota court's own prior decisions impose a proper standard of "substantial evidence," e.g. *Hagen v. Civil Service Board*, 282 Minn. 296, 164 N.W.2d 629 (1969); *Wilkes v. Hoaglund*, 293 Minn. 425, 196 N.W.2d 475 (1972); *Gibson v. Civil Service Board*,285 Minn. 123, 171 N.W.2d 712 (1969), and in such decisions as those the "substantial" burden of proof was in fact applied and enforced.

Here, on the other hand, the discharge was not supported by evidence of willfull, intentional or damaging act or omission and (in addition to the injustice of this Petitioner) the decision is thus an invitation to future pretextual discharges in violation of the Fourteenth Amendment.

CONCLUSION

For these reasons Petitioner Setchell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Minnesota Supreme Court.

Respectfully submitted,

JACK S. NORDBY
THOMSON & NORDBY
Suite 1530 - 55 East Fifth Street
Saint Paul, Minnesota 55101
(612) 227-0856
Counsel for Petitioner

APPENDIX

In the Matter of the Discipline of George B. SETCHELL, Deputy Sheriff, Anoka County, Minnesota.

No. 47535.

Supreme Court of Minnesota

December 16, 1977

Rehearing Denied Jan. 10, 1978.

PER CURIAM.

This is an appeal from an order of the district court affirming a decision of the Anoka County Sheriff's Civil Service Commission removing Deputy Sheriff George B. Setchell from the service register. Appellant's assertion of error based upon the claim that the determination that he is guilty of willful misconduct is not supported by substantial evidence. We affirm.

At the time of his dismissal, appellant served Anoka County as a deputy sheriff under specific assignment to the crime lab. The charges filed against him stem from various alleged incidents in connection with the performance of his duties, however, at the hearing before the commission evidence of only two of the alleged incidents was presented. Included in the first charge was the allegation that on June 3, 1974, Setchell delivered certain film to Brown Photo for processing which contained photographs taken during the investigation of a murder-suicide occurring in Anoka County in August 1973. The commission found that, since the investigation had been completed in the fall of 1973, nearly 10 months before appellant delivered the film for processing, the photographs were processed without authorization and in furtherance of no police purpose.

The second charge contained an allegation concerning appellant's failure to employ standard procedures and to obey his supervisor's direct orders in connection with the chemical testing of suspected narcotics evidence seized during the execution of a search warrant on May 23, 1974. Setchell had been specifically

directed to transport the evidence to the Bureau of Criminal Apprehension. Although he had failed to do so, he nevertheless made several affirmative answers to his superior when asked if the order had been executed.

The commission found that appellant had disobeyed a direct order of a superior officer by failing to transport the suspected evidence and that he made false representations of having done so. It noted that, as the position of crime lab deputy requires the highest standards of integrity and as the timely performance of duties is crucial, appellant's willful actions mandated a statutory finding of misconduct and a resultant discharge from employment. Minn.St. 387-41. The commission ordered that appellant's name be stricken from the service register and that he be discharged, effective July 27, 1974.

In affirming the commission's decision, the district court concluded that the decision was reasonable and was supported by ample and substantial evidence. It stated that the severe penalty of discharge is both reasonable and foreseeable when the employee willfully fails to properly execute his duties; that statement was based upon the court's review of evidence before the commission as to the repetitive nature of the conduct and the attempts of the sheriff's department to correct the problems by internal or departmental sanctions.

[1] Our inquiry is limited to whether the findings upon which a discharge is based are supported by substantial evidence on the record, considered as a whole. *Thoreson v. Civil Service Comm.*, Minn., 242 N.W.2d 603 (1976); *Hagen v. State Civil Service Board*, 282 Minn. 296, 164 N.W.2d 629 (1969); *State ex rel. Jenson v. Civil Service Comm.*, 268 Minn. 536, 130 N.W.2d 143 (1964), certiorari denied, 380 U.S. 943, 85 S.Ct. 1023, 13 L.Ed.2d 962 (1965).

Appellant presents a two-pronged argument. In the first instance, he argues that the element of willfulness must be implied in the statutory criteria justifying removal, § 387.41, and

concludes that the record does not contain substantial evidentiary support for a finding of willful misconduct. Rather, appellant categorizes his conduct as merely inadvertent.

[2,3] This argument fails for two reasons: First, the commission, as the trier of fact, is empowered to weigh the conflicting testimony, and its findings, essentially having the effect of rejecting appellant's justifications for hi s conduct, are supported by substantial evidence. *Wilkes v. Hoaglund*, 293 Minn. 425, 196 N.W.2d 475 (1972); *State ex rel. McCarthy v. Civil Service Comm.*, 277 Minn. 358, 152 N.W.2d 462 (1967). In addition, § 387.41 is patently explicit in not requiring a specific finding that the misconduct justifying removal was willful. Rather, any conduct may result in discipline if it is inappropriate when considered with reference to the character of the office. *Thoreson v. Civil Service Comm., supra.* The sensitive and demanding duties of a deputy sheriff are capable of actionable breach by conduct which is not necessarily willful. While the conduct examined herein was specifically held to be willful, that determination is superfluous to the finding of misconduct required by the statute.

Appellant's second assertion is summarily that the extraordinary circumstances of this case justify a complete reversal and that this could be accomplished without undermining the authority of the commission. Such a theory is without merit when considered in light of the record as a whole.

As there is substantial evidence to support the finding of the district court that the commission's order discharging appellant was reasonable and based upon ample evidence, the district court order is affirmed.

Affirmed.

OTIS J., took no part in the consideration or decision of this case.

STATE OF MINNESOTA

Office of Clerk of Supreme Court

ST. PAUL, MINN.

January 10, 1978

In the Matter of the Discipline of George B. Setchell, Deputy Sheriff, Anoka County, Minnesota.

No. 47535

SIR:

You will please take notice that on this date the following order was entered in the above entitled cause:

ORDERED, that the petition for reargument herein be and the same hereby is denied and stay vacated.

FINDINGS, CONCLUSIONS AND ORDER

The above entitled matter came on for hearing before the Anoka County Sheriff's Civil Service Commission under the provisions of Minnesota Statutes 387.40 to consider the charges of Sheriff Ralph Talbot contained in his notice to the Civil Service Commission of June 24, 1974. The Commission met on the 24th day of July, 1974, to consider said charges. On the 24th day of July, respondent George B. Setchell appeared in person and through his attorney, Douglas Thomson. Harold H. Sheff, Assistant Anoka County Attorney, appeared on behalf of the Sheriff on the 24th day of July, 1974. The Sheriff, through his attorney, Harold H. Sheff, presented evidence only regarding charges I(c) and II(d) as contained in his notice of charges to the Civil Service Commission of June 24, 1974. After hearing the testimony of the various witnesses and considering the evidence presented, the Commission hereby makes its

FINDINGS OF FACT

1. That at all times pertinent hereto, Ralph W. Talbot was the duly elected, qualified and acting Sheriff of Anoka County, Minnesota.

2. That at all times pertinent hereto, George B. Setchell was a duly appointed, qualified and acting deputy sheriff of Anoka County, Minnesota, under assignment to the crime lab.

3. That on the 24th day of June, 1974, Ralph W. Talbot as Sheriff and acting pursuant to the authority invested in him by Minn. Stat. 387.14, Minn. Stat. 387.37 and Minn. Stat. 387.40 filed written charges against George B. Setchell with the Anoka County Sheriff's Civil Service

Commission. That pursuant to the authority of said Minnesota Statutes and of said charges, the Sheriff suspended without pay George B. Setchell from employment from June 11, 1974 to and including July 22, 1974.

4. That pursuant to the provisions of Minnesota Statutes 387.40, this Commission did conduct a trial and hearing into said charges.

5. That George B. Setchell did take photographs of the Dix murder-suicide autopsy at Unity Hospital.

6. That the Dix murder-suicide case had been officially closed since Fall, 1973.

7. That the location of the Dix murder-suicide autopsy film from the time George B. Setchell placed the film in the Anoka County Sheriff's Department darkroom until June 3, 1974, was not established.

8. That George B. Setchell did take the Dix murder-suicide autopsy film to Brown Photo, Northtown, on June 3, 1974, for development and printing.

9. That there was no authorized police purpose for the printing and development of the Dix murder-suicide autopsy film on June 3, 1974.

10. That there is no direct evidence that George B. Setchell knowingly and willfully took the Dix murder-suicide autopsy film to Brown Photo, Northtown, on June 3, 1974, for development and printing.

11. That on May 23, 1974, George B. Setchell participated in the execution of a search warrant at the Jon Rector residence.

12. That on May 23, 1974, certain suspected drug evidence was seized in the execution of the search warrant at the Jon Rector residence.

13. That George B. Setchell took custody of the suspected drug evidence on May 23, 1974.

14. That the standard operating procedure of the Anoka County Sheriff's Office required that George B. Setchell take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

15. That Supervisor of Investigators, William Hoogestraat, specifically ordered George B. Setchell to take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

16. That George B. Setchell stated on several different occasions that he did take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

17. That George B. Setchell did not take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

18. That George B. Setchell did not follow the standard operating procedures of the Anoka County Sheriff's Office when he failed to take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

19. That George B. Setchell disobeyed a direct order of a superior officer when he failed to take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

20. That George B. Setchell lied when he stated on several different occasions that he did take the suspected drug evidence to the Bureau of Criminal Apprehension for analysis.

21. That George B. Setchell has a prior record of disciplinary action being taken against him including a suspension for disobeying a direct order of a superior officer.

22. That the position of crime lab deputy requires the highest standards of integrity and the timely performance of his duties is crucial to the successful prosecution of criminal case.

CONCLUSIONS

That George B. Setchell willfully disobeyed a direct order of a superior officer and failed to perform a duty which was a critical part of his assignment.

That George B. Setchell is guilty of misconduct, under Minn. Stat. 387.41, and should be and is here discharged.

ORDER

It is hereby ordered that George B. Setchell be removed from employment as a Deputy Sheriff of Anoka County, Minnesota, and his name be stricken from the service register this 27th day of July 1974. The suspension order of the Sheriff is affirmed for a period of thirty days from June 11, 1974, to and including July 22, 1974, and that George B. Setchell is entitled to pay from July 23, 1974 to and including July 27, 1974.

/s/
Chairman, Anoka County Sheriff's Civil Service Commission

/s/MALCOLM B. ALLEN Commissioner

(Title of Cause.)

ORDER

An appeal has been made to the District Court from an order of the Anoka County Sheriff's Civil Service Commission wherein the above named George B. Setchell, a Deputy Sheriff, was found guilty of: 1. Willfully disobeying a direct order of a superior officer. 2. Failing to perform a duty which was a critical part of his assignment, and as a result, removed from his employment.

The appeal, pursuant to M.S.A. 387.41, was submitted on the record and heard through briefs and written argument. The Court has carefully considered the matter and herewith affirms the order of the Civil Service Commission on the grounds that the order of the Commission was reasonable, as more fully set forth in memorandum attached hereto and made a part hereof.

Dated May 3, 1976.

/s/ROBERT B. GILLESPIE
District Judge

MEMORANDUM

Reviewing the evidence in the light most favorable to the Commission, this Court believes that there was ample and substantial evidence to sustain the order of the Commission. A termination of employment is a severe penalty, but an employee is expected to follow the rules of his employment and where he wilfully fails to do so, he cannot complain if the employer decides he does not wish to continue the employer-employee relationship.

The evidence indicates that Deputy Setchell has previously been suspended for disciplinary reasons. After the filing of the instant dismissal charges, a full hearing was afforded, (Setchell being represented by competent counsel). Evidence was offered to

substantiate charge Ic and IId. It is clear from such evidence that Deputy Setchell failed to follow standard operating procedure in connection with submitting any evidence to the Bureau of Criminal Apprehension for analysis; that his superior officer specifically ordered him to so proceed and that he failed to do so even though he had been reminded to do so by another officer. Though Deputy Setchell attempted to justify his failure to perform his duty and respond to a direct order of his superior, the Commission hearing the evidence rejected his testimony, which as the trier of fact, it had a right to do.

In an appeal under M.S.A. 387.41, the only issue before the Court is "Upon the evidence, was the order of the Commission reasonable?" The Court cannot substitute his judgment as to the result of the findings, unless the record fails to substantiate the charges made. The testimony at the hearing presented fact questions resolved by the Commission in favor of the employer. It is not for the Court to say that the action taken by the Sheriff was too harsh a penalty to impose. The Court is not a super Civil Service Commission and cannot reverse the action of the Sheriff or the Commission unless the order of the Commission was unreasonable based upon the evidence before it.

The evidence is uncontroverted that Deputy Setchell failed to perform a critical part of his assigned duties. The evidence is clear that he failed to obey a specific order to carry out such duty and a consideration of all the testimony justified the trier of fact in determining that such failure was wilful, intentional, and without justificable excuse.

The Court has reviewed the cases submitted by counsel bearing upon the law to be applied in civil service order appeals and is satisfied that the decision of the Court herein is in accordance with the law.

/s/R.B.G.